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ALEXANDER L. STEVAS,
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No. 80-1577

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF MESQUITE

Appeliant,

v.

ALADDIN'S CASTLE, INC.,

Appellee.

On Appeal From The United States Court Of Appeals
For The Fifth Circuit

APPELLEE'S MOTION TO AFFIRM

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QUESTION PRESENTED

Appellant ("Mesquite"), Defendant in the trial court, here continues a five-year effort, accepted in part by the District Court, but rejected by the Fifth Circuit, to prohibit Appellee ("Aladdin's") from operating an amusement center in the City of Mesquite, Texas. The question presented to this Court is under what circumstances, if any, may a municipality pass and enforce an ordinance, under the guise of regulation, that denies its citizens, businesses and taxpayers their constitutional rights of due process of law, equal protection of the laws, and freedom of association.

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Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and decree of the United States Court of Appeals for the Fifth Circuit be affirmed on the ground that the question presented to this Court is so unsubstantial as not to warrant further argument.

STATEMENT

This is an appeal from the final judgment and decree entered on November 17, 1980, by the United States Court of Appeals for the Fifth Circuit, holding Mesquite's ordinance No. 1353 to be violative of the due process and equal protection clauses of the constitutions of the United States and the State of Texas and to be violative of the constitutional guarantee of freedom of association. Aladdin's and Mesquite have been embroiled in five

years of litigation in state court and federal court, involving various attempts by Mesquite to prohibit Aladdin's from owning and operating a family amusement center in the City of Mesquite, Texas. This case involves Mesquite's latest attempt, which is two-fold. First, Mesquite seeks to prohibit children under the age of 17 from playing any machine in such an amusement center, after having previously allowed children of age 7 and above to play such machines. Second, Mesquite seeks to deny a license to operate an amusement center to any applicant determined by its chief of police to have "connections with criminal elements," as that phrase is defined by the ordinance.

The Fifth Circuit held that the 17-year-old age was repugnant to the due process and equal protection clauses of the constitutions of the United States and the State of Texas in that the ordinance was arbitrary and irrational. Mesquite's stated reasons for passage of the 17-year-old age were truancy and exposure of minors to corrupting influences. The Fifth Circuit found that these grounds were baseless and that the ordinance had no legitimate purpose. The Court's opinion is comprehensive and speaks for itself; and it would not serve any purpose at this point to recite the evidence and authorities contained therein.

The Fifth Circuit also held that the term "connection with criminal elements," as defined by ordinance No. 1353, was unconstitutionally vague because it failed to give individuals fair notice of the conduct proscribed by it and because such ordinance engendered the possibility of arbitrary and discriminatory enforcement by public officials.

After finding the 17-year-old age had no rational basis nor legitimate purpose, the Fifth Circuit went on to hold that the age restriction, even if it did have a rational basis and a legitimate purpose, was unconstitutional inasmuch as it deprived

individuals under 17 years of age their liberty interests in association.

Mesquite here challenges the Fifth Circuit's opinion only insofar as it holds ordinance No. 1353 to be void for vagueness and to be violative of minors' liberty interests in association. However, Mesquite does not question the ruling that the ordinance is arbitrary and irrational.

ARGUMENT

The decision of the United States Court of Appeals for the Fifth Circuit is plainly correct and Mesquite's jurisdictional statement concedes this by failing to challenge the Fifth Circuit's holding that ordinance No. 1353 is arbitrary and irrational under the constitutions of the United States and the State of Texas. Moreover, the Fifth Circuit held that Mesquite loses its case under the rational basis theory relating to due process and equal protection* and under the strict scrutiny theory relating to freedom of association. Thus, Mesquite has nothing to gain by its appeal in connection with the 17 year age restriction, thereby making its appeal one of scholarly or intellectual interest, and inappropriate for consideration by this Court. *Cf., Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (writ of certiorari dismissed as improvidently granted).

Mesquite's argument for plenary review by this Court of the Fifth Circuit's decision in connection with minors' liberty interests in association is that the opinion presents a novel constitutional question that must be resolved so that legislative bodies can determine which of their statutes trammel fundamental rights. This argument must fail for three reasons.

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*Since Mesquite does not challenge the Fifth Circuit's holding that the ordinance is arbitrary and irrational, Aladdin's does not believe it is necessary to discuss the merits of this argument. It suffices to say that the Fifth Circuit's opinion is based upon settled law, as applied to the facts of this case.

First, assuming that the Fifth Circuit's decision with respect to freedom of association presents a novel constitutional question, it has been this Court's practice to avoid the unnecessary decision of such a question. *Leroy v. Great Western United Corp.*, ... , U.S. ..... , 99 S. Ct. 2710, 2715-2716 (1979). Certainly the decision of the Fifth Circuit with respect to the irrationality of ordinance No. 1353 constitutes more than an adequate basis for affirmance of the Fifth Circuit's decision.

Second, by its appeal, Mesquite asks this Court to define the totality of the relationship of the juvenile and the state, so that Mesquite can make a wholesale determination as to the constitutionality of its laws dealing with minors. This Court has been, at best, reluctant to undertake this task. *Carey v. Population Services International*, 431 U.S. 678, 692 (1977).

Third, the Fifth Circuit's opinion with respect to the liberty interests in association of minors presents no novel constitutional question, and it is correct and should be affirmed. There can be no dispute with the Fifth Circuit's conclusion that the right of association is fundamental, 630 F. 2d 1029, 1041; and this Court has recognized the right of social association in *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974). Also, this Court has passed upon the state's power to regulate conduct that is otherwise constitutionally protected, if the regulation applies only to children, *Bellotti v. Baird*, 443 U.S. 622 (1979); and the Fifth Circuit was quite correct in stating that Mesquite's ordinance was not based upon any of Justice Powell's three considerations that might permit the state to restrain minors in a way which would be unconstitutional if applied to adults, 630 F. 2d 1029, 1043-1044. In short, the state has no more interest in barring minors from an amusement center than it does in barring them from the parks, the playgrounds or the churches or in choosing the friends with whom a minor will associate. At the most, these are matters that should be left between the minor and his or her parents. And, of course, Mesquite has available to it other laws to protect its young people from undesirable influences. 630 F. 2d 1029, 1042.

Mesquite also makes other statements in its jurisdictional statement that the Appellee will briefly address. First, Mesquite claims that the Fifth Circuit's decision raises the question of whether Aladdin's has standing to assert the associational interests of children. It does. *Carey v. Population Services International*, 431 U.S. 678, 683-84 (1977).

Mesquite also mentions that no party contended that the strict scrutiny standard is applicable in this case. However, this is a question of law, upon which the Fifth Circuit had broad latitude and upon which it could make an independent determination as to the legal conclusions and inferences to be drawn from the facts in the case. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961). The District Court held that the proper test of law was the rational basis test. The Court of Appeals' latitude includes the legal standard to be applied to the facts. See *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 193 (1963); also *Miller v. United States*, 587 F. 2d 991, 994 (9th Cir. 1978).

Finally, Mesquite seeks review of the Fifth Circuit's void for vagueness holding in connection with the phrase "connection with criminal elements" and the definition thereof. Mesquite erroneously characterizes that phrase and definition thereof as an "in-house directive." Mesquite's argument is based upon a misreading of ordinance No. 1353, is supported by no authority and is patently lacking in logical substance. The ordinance is regulatory and proscriptive; and an applicant must seek the consent of five parties, including the chief of police to obtain or renew a license. Thus, ordinance No. 1353 fails to give an applicant for a license fair notice of the conduct proscribed, engenders the possibility of arbitrary and discriminatory enforcement of the ordinance and permits the City of Mesquite to become a government of men and not laws. It is submitted that this portion of the case is controlled by *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

CONCLUSION

For all of the foregoing reasons, Aladdin's respectfully submits that Mesquite presents no substantial question for the decision of this Court and that the judgment and decree of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, Thomas L. Case, counsel for appellee, and a member of the Bar of the Supreme Court of the United States, hereby certify that I hand delivered three (3) copies of the foregoing Motion to Affirm on the 15th day of April, 1981 to James A. Ellis, Jr., Esq. of Carrington, Coleman, Sloman & Blumenthal, 2500 South Tower, Plaza of the Americas, Dallas, Texas 75201.

/s/ THOMAS L. CASE

Thomas L. Case